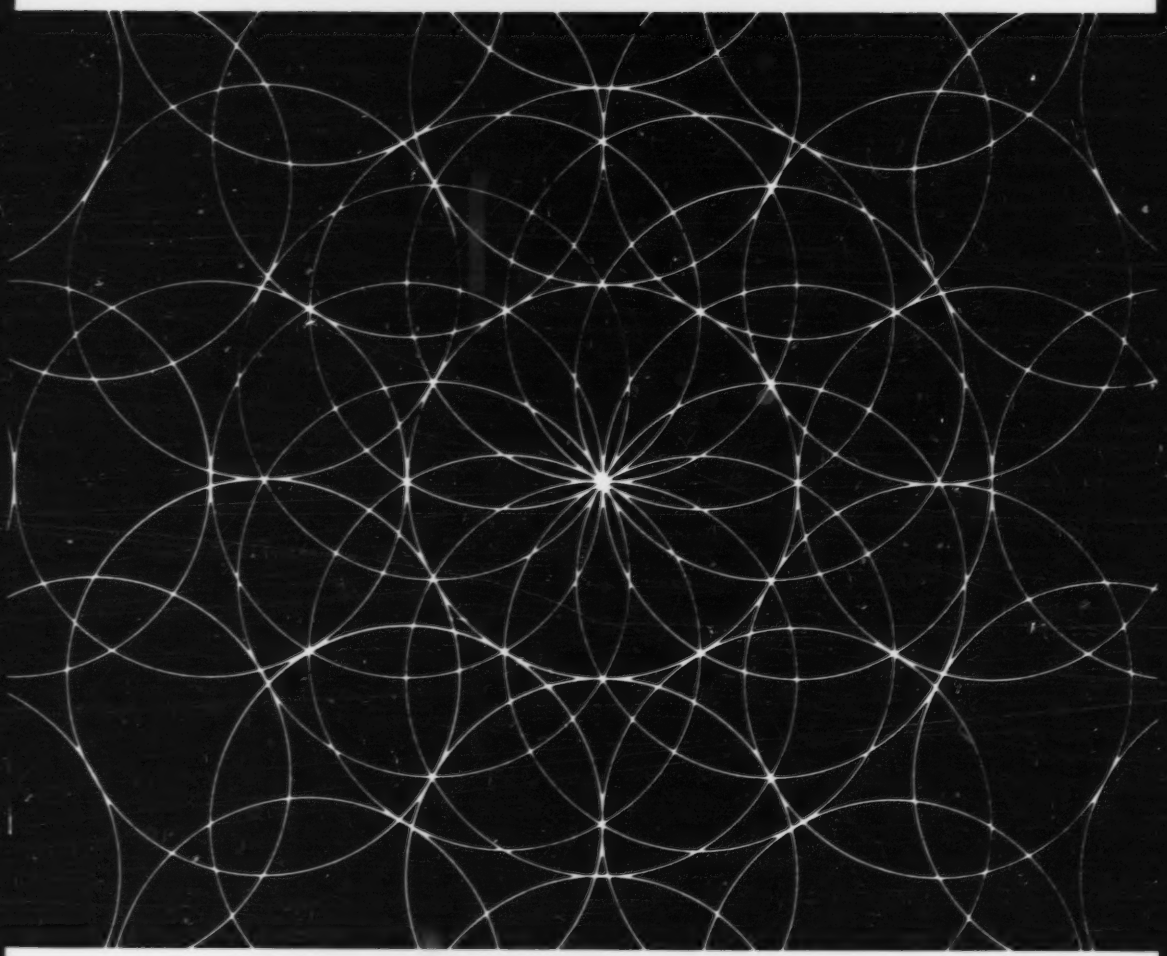
Report on

1983

The Structure of the Courts; Part II: The Adjudication of Smaller Claims



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LAW REFORM COMMISSION

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REPORT ON THE STRUCTURE OF THE COURTS; PART II: THE ADJUDICATION OF SMALLER CLAIMS

March 7, 1983

Report #55

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CHAPTER I

INTRODUCTION

Terms of Reference

1.01 In May 1981, the Manitoba Law Reform Commission received a request from the Honourable the Attorney-General to enquire into and consider certain matters pertaining to the structure and the organization of trial courts in Manitoba.

1.02 In particular, the Commission was asked to study the possible merger of the Court of Queen's Bench and the County Courts of Manitoba. Also requested to be included in this study were the following topics:

(a) means to ensure or improve the speedy, inexpensive and appropriate adjudication of small claims;

(b) whether there should be any transfer or return to the courts of work now being done by various special tribunals; and

(c) any other modifications of the jurisdiction, structure or operation of the trial courts that would benefit the administration of justice in the province.

1.03 In September, 1981 the Commission requested and received approval from the Honourable the Attorney-General to defer the consideration of the topic referred to in sub-paragraph (b) above since this would involve a very large study of all administrative tribunals in the Province and delay report on the other areas of the reference.

1.04 The Commission decided to deal with the remaining aspects of this

reference in two parts. In Part I, we enquired into and recommended the amalgamation of the Court of Queen's Bench and the County Courts to form one superior court of general jurisdiction in Manitoba. Our recommendations have been published in a Report issued on October 25, 1982.[1] In this second Part of the reference on the structure of the trial courts, we examine the small claims system, currently governed by Part II of "The County Courts Act".

1.05 Aside from our general terms of reference concerning the small claims system, the Commission was specifically requested to study the concerns expressed about the training of clerks (who currently hear these matters), and to address the possibility of annexing the small claims system to the Provincial Judges' Court, rather than the County Courts of Manitoba, as presently. The third specific feature of this enquiry was to consider increasing the monetary jurisdiction of the small claims court.

1.06 In this Part of the Report, we shall attempt to address these issues as they relate to all of the other features of the small claims court. This involves a discussion of the nature of the court, what its objectives should be and what changes should be recommended to the small claims court having regard to these objectives.

1.07 As in the first Part of this Report, only general recommendations have been made, because the Commission is of the opinion that the Legislature, the executive and the judiciary, each in its proper sphere of responsibility, are more qualified to deal with the details of implementation.

Structure of Report

1.08 The structure of this Part of the Report is as follows. Chapter 2 sets out the general objectives that we have borne in mind in framing our proposals for an appropriate system for dealing with small claims. What then

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[1] Report on the Structure of the Courts; Part I: Amalgamation of the Court of Queen's Bench and the County Courts of Manitoba (1982) 52 M.L.R.C.

follows is a summary of the present system for the adjudication of small claims and an assessment of that system in light of those objectives. In Chapter 3, we examine particular issues regarding a small claims court and make recommendations for the changes and new measures we think to be needed or desirable. Implementation of these recommendations is dealt with briefly in Chapter 4. Chapter 5 sets forth a summary of our recommendations.

1.09 This Part of our Report on the Structure of the Courts presupposes that the Court of Queen's Bench and the County Courts of Manitoba will merge to form one superior trial court of general jurisdiction in the Province. Accordingly, references in this Part of the Report to the Court of Queen's Bench are to an amalgamated Court.

Hearings and Submissions

1.10 The Commission appointed a small study group which held meetings throughout the province with bar associations to gain the views of the legal profession on the matters under discussion in Part I and Part II of this Report. These included meetings with the Central Bar Association at Portage la Prairie, the Western Bar Association at Brandon, and the Dauphin Bar Association at Dauphin. The group also met with the Northern District Bar (The Pas and Flin Flon) at The Pas and the Northern District Bar (Thompson) at Thompson.

1.11 The group met with the Chief Justice of Manitoba, the Chief Justice of the Court of Queen's Bench, the Chief Judge of the County Courts and the Chief Judge of the Provincial Judges Court. In addition, there were meetings with other members of the Bench and Bar in Brandon, Winnipeg, and St.Boniface.

1.12 By letters and notices, the study group solicited as well the observations and opinions of members of the Bench and Bar and of various organizations or associations of lawyers. Some informative and helpful letters were received. The study group had the benefit of discussions with invited groups of lawyers with special experience in particular fields of practice.

1.13 The Commission has also been given much assistance by the Prothonotary and members of his office and by those involved in the study and administration of small claims courts in other provinces.

Acknowledgments

1.14 We express our gratitude to those who responded so helpfully to our requests for information and opinions. Once again we wish particularly to acknowledge the advice and assistance of Harold St.George Stubbs, Q.C., Secretary Emeritus of The Law Society of Manitoba, who was a member of our study group.

1.15 We also wish to record our gratitude to Professor R. Dale Gibson of the Faculty of Law, University of Manitoba. The Commission engaged Prof. Gibson as a consultant with respect to the constitutional issues which became relevant in studying the options of reform to the present system of small claims adjudication. The major conclusions of Prof. Gibson are briefly summarized in Chapter 3 of this Report.

1.16 We also appreciate the assistance given to us by Professor Janet Baldwin, of the Faculty of Law, University of Manitoba, who made available to us two studies she had done on the Manitoba small claims court: one for the Eighth Annual Workshop on Commercial and Consumer Law[2], and the second one for the 1980 Canadian Institute for the Administration of Justice Conference on Small Claims Courts.[3] Funds for both of these studies were provided by the University of Manitoba.

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[2] Papers published in Jacob S. Ziegel (ed.) Papers and Comments delivered at the Eighth Annual Workshop on Commercial and Consumer Law (1980).

[3] The proceedings of the Canadian Institute for the Administration of Justice Conference on Small Claims Court, held in Toronto in September 1980, are unpublished. Some of the proceedings from a later conference in January, 1982, sponsored by the Institute on "Small Claims and Access to Justice" are published in (1982) 20 Alta. L. Rev. at 314, 326 and 475.

CHAPTER 2

OBJECTIVES OF A SMALL CLAIMS COURT

Purpose of this Chapter

2.01 The purpose of this Chapter is to determine the appropriate objectives of a small claims court system and to examine the existing small claims court system in light of those objectives. The identification of the objectives will form the basis of our recommendations concerning the reform of the existing Court which will be set forth in the succeeding Chapter.

The Objectives

2.02 It is our view that a small claims court should provide a simple, accessible and effective forum for resolving certain kinds of legal disputes in accordance with the rule of law, as indeed should all other courts. In the following paragraphs, we describe in greater detail these basic goals or objectives as they specifically apply to a small claims court.

2.03 Simplicity. The practice and procedure adopted for a small claims court must be simple and informal so that it allows parties to represent themselves as effectively as possible. The formality of the higher courts is unsuitable for small claims particularly if one bears in mind the expense of legal representation. Accordingly, care must be taken to ensure that the judicial process is relatively straightforward so that it is readily comprehended by those who are not involved as lawyers with the court.

2.04 Accessibility. It is important that everyone have the opportunity to bring a small claim for adjudication. This will encourage confidence in our legal institutions. There are generally three steps which must be followed for a small claims court to be accessible. First, in keeping with the fundamental precept that knowledge is an essential tool for the exercise of substantive

rights, its function must be widely known by the general population. Second, the court must take care that the adjudicative process is inexpensive for its users. The third requisite step for accessibility involves geographic and other considerations; ideally, the court should have facilities for filings and hearings throughout the province so that, regardless of place of residence, a person may bring a small claim without considerable inconvenience or expense.

2.05 Effectiveness. For a small claims court to be an effective forum, there must be a prompt and speedy resolution of disputes. The pre-trial procedures in the other, more formalized courts which define the facts and issues in dispute result in delay and are generally inappropriate for a court which encourages self-representation. For a small claims court to be effective, users must be confident as well that a judgment is worth receiving. In a wholly satisfactory system, it must be possible for a successful party to be able to enforce or realize on the judgment in his or her favour without undue difficulty.

2.06 These hallmarks of simplicity, accessibility and effectiveness are inextricably interlinked; each without the other would be incomplete and unfulfilled. It is our view that their presence would assist in providing a high standard of justice in adjudicating small claims. A further point to emphasize in discussing the court's primary purpose is that, like any court, it should be governed by a duty of fairness and be bound by the rule of law. In this manner, its standard of justice should mirror the quality dispensed by the other, more formalized courts in this province.

2.07 Although the quality of justice in a small claims court should not be perceived to be inferior to that of the traditional higher courts, it must be ensured that the costs of providing a small claims service do not become too disproportionate to the total amount of claims at stake. This need to be mindful of the costs in administering small claims must be balanced against the objective of providing an accessible and effective court that is procedurally fair and governed by the rule of law. The ultimate goal in forming a small claims court therefore is to find the "point of equilibrium" between these somewhat countervailing factors.

The Present System

2.08 The Legislature recognized the need for an effective small claims system when it enacted Part II of "The County Courts Act", C.C.S.M. c. C260, in 1971[4] for the purpose of enabling people to enforce their rights more cheaply than was possible at the time.[5] The legislation replaced "The Small Debts Recovery Act"[6], which had established a quasi-criminal process for recovering small liquidated[7] debts through the (now defunct) Magistrates Court. The new legislation broadened the scope of recovery for small claims to include any matter within the jurisdiction of the County Courts where the amount involved does not exceed a specified amount, currently $1,000.

2.09 The present legislation under Part II of the Act empowers County Court clerks and judges to hear small claims. In practice, all but a few claims are adjudicated in the first instance by clerks; since 1980, for example, less than 2% of the total number of small claims adjudicated in Manitoba have been heard by Judges, as opposed to clerks.[8] Hearings take place in approximately 19 centres situated throughout the province. Attempts have been made to establish a circuit or rota system involving the dozen or so clerks who hear small claims in Manitoba so that the clerk who processes the claim is not the one who hears the action. This has not been possible lately, however, because of

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4 S.M. 1971, c. 77. This initial legislation applied only to the Winnipeg area. In 1972, this Act was replaced with legislation which applied to all of Manitoba. See S.M. 1972, c. 38.

5 See Legislative Assembly of Manitoba, Debates and Proceedings vol. XVIII, Third Session, 29th Legislature at 2861 ff. for a discussion concerning the objective of introducing the small claims system to Manitoba.

6 R.S.M. 1970 c. S140.

7 Black's Law Dictionary (5th ed.) at 838 defines "liquidated" as "[a]scertained; determined; . . . made clear or manifest".

8 The number of small claims decided by Judges relative to the total number of small claims adjudicated throughout Manitoba is: (1981) 68 out of 4,695 or 1.45%; (1980) 74 out of 4,930 or 1.50%.

limitations of budgets and personnel.

2.10 A small claims action is commenced in the ordinary manner by filing a simple statement of claim in the appropriate County Court office. Assistance with the mechanics of completing the claim is offered by the court clerks, but no legal advice is given as the clerks are not lawyers. A hearing date and time is affixed to the claim by the clerk in question who then instructs the plaintiff to serve the defendant(s) personally, by leaving the form with an adult at the defendant's residence, or by registered or certified mail.

2.11 If the defendant prefers the action to be heard by the more formalized procedure normally used for larger County Court claims, (s)he may do so by filing a form called a "Notice of Objection". The action will then proceed under Part I of "The County Courts Act" and a statement of defence will be required before the action proceeds to trial before a Judge. In the event no Notice of Objection is filed, consent to proceed in the small claims court is presumed. As no statement of defence is required in small claims court, the matter immediately proceeds to the actual hearing before a clerk (or, exceptionally speaking, a judge). Should the plaintiff's claim prove successful, costs and disbursements may be awarded in addition thereto and a Certificate of Decision setting forth these amounts is then issued by the clerk. If there is no appeal of the decision, a Certificate of Decision may then be filed in a County Court, whereupon it becomes a judgment of that Court and can be enforced as such. The enforcement of a judgment is governed by general County Court Rules which closely parallel those adopted by the Court of Queen's Bench.

2.12 The forum and scope of an appeal from a small claims decision depend upon who adjudicates at the hearing. If a claim is heard by a clerk, there is an appeal to a judge of the County Court on any ground and the matter is heard by way of trial de novo ("new trial"). Appeals from a decision of a Judge sitting at the small claims hearing or at the trial de novo are to the Court of Appeal and are, by the Act, limited to questions of law alone.

Assessment of Present System

(a) Simplicity

2.13 The practice and procedure adopted by the small claims court is simpler and more informal than that adopted by the Court of Queen's Bench or the County Courts (Part I). Aside from the initial statement of claim, no other form is required to be completed and filed with the court. Although some limited assistance is given to a plaintiff in completing a statement of claim, there is little other help given generally to prepare the litigant for his or her hearing. In addition, the written information and forms of the small claims court are insufficient, as compared to other jurisdictions, in explaining the procedure to litigants.[9] Studies in other jurisdictions have shown that preparatory assistance does have a significant effect on a litigant's rate of success.[10]

2.14 The simplicity achieved by the small claims court in Manitoba may be frustrated if the defendant proceeds under Part I of "The County Courts Act" or files a Notice of Objection. Notices of Objection do occur despite the fact that a defendant must pay into court security for costs in an amount to be determined by the clerk or judge (see s. 88(1) of the Act).[11] Studies have shown that where a defendant objects to the small claims court procedure, fewer plaintiffs pursue their claims than is the case when no Notice of Objection is filed. In Winnipeg (1979), for instance, only 16.6% of the claims to which a Notice of Objection was filed ever went to trial as compared with the 59% that

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[9] See infra , para. 4.08.

[10] S. Weller, "Success in Small Claims: Is a Lawyer Necessary?" (1977-78) 61 Judicature 176 at 183.

[11] The percentage of Notices of Objection filed relative to the number of small claims filed, throughout Manitoba is:

1981	1980	1979	1978	1977
1.95%	1.04%	2.51%	2.23%	2.03%

went to trial when no Notice of Objection was filed.[12] This may be due to the fact that the majority of these plaintiffs did not wish to be self-represented in the more formal atmosphere of the County Courts and could not afford legal representation given the amount of their claim. In any event, the right of a defendant to file a Notice of Objection may be an impediment, especially where the parties to a dispute are of different economic means such that one can afford legal representation and the other cannot.

(b) Accessibility

2.15 Access to the present small claims system is restricted in the following respects:

1. Monetary jurisdiction. The small claims court has jurisdiction to hear any matter within the authority of County Courts as long as the amount in dispute does not exceed $1,000. The monetary jurisdiction of the court has remained constant since September 1977 despite the fact that the Consumer Price Index for Canada, All-items (Not Seasonally Adjusted) has risen over 65% since that date. More importantly, we have been informed by members of the practising Bar that it may cost up to $3,000 in legal fees and disbursements to try an action under Part I of "The County Courts Act".[13] This means that persons with claims under $3,000 may be discouraged from proceeding in the more formal

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[12] In the County Court of Winnipeg (1979) 4,864 claims and 169 Notices of Objection were filed. Of the 169 objections filed, 28 or 16.6% went to trial. Of the 4,695 claims not objected to, 2,785 or 59% went to trial.

[13] We understand that legal fees of this range would involve senior counsel in a case of considerable complexity and would include preparation for and attendance at an examination for discovery and possibly other pre-trial procedures.

setting of the County Court with legal representation because the costs could exceed the amount of recovery. A solution is to expand the monetary jurisdiction of the small claims court, which is specially suited for self-representation, so that the administration of justice becomes more accessible to persons who require judicial redress, regardless of the amount of their claims.

2. Geographic. Generally, accessibility to filing and hearing centres is adequate in Winnipeg and southern Manitoba. In the North, however, there are only three hearing centres: Flin Flon, The Pas and Thompson. People residing outside those centres in the North must either bear the expense of travelling or forego their claims. Throughout the province, centres are only open during the weekdays. Many litigants may lose wages for the time they must take from work in order to attend at court, because it is only open during business hours.

2.16 The majority of plaintiffs using the small claims court are "non-individuals"[14] (62.5% non-individuals; 37.5% individuals). The largest users are department stores,[15] public corporations,[16] finance companies,[17]

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[14] "Non-individuals" include corporations generally, government agencies, finance companies, banks and department stores.

[15] In the County Court of Winnipeg, in 1979, Sears was the most frequent plaintiff, filing 354 claims. More recent statistics are not available.

[16] In the County Court of Winnipeg, in 1979, the Manitoba Telephone System was the second most frequent plaintiff, filing 197 claims. More recent statistics are not available.

[17] Finance companies were plaintiffs in 9.7% of all claims filed in 1979 in the County Court of Winnipeg.

banks and credit unions.[18] It is important, in our view, that the small claims court be used by all segments of society, including those with low or moderate means who might otherwise be alienated from the civil court system. For this to occur, it is obviously essential that the existence of the small claims court be widely known by the general population. Although a small informal pamphlet has been prepared and written for those who wish to use the court, there has been less initiative taken in regard to publicizing the existence of the present court to the public at large.

(c) Effectiveness

2.17 The small claims system is speedy, in part, because actions are required by statute to be scheduled for hearing between 21 and 60 days from the filing of the statement of claim (s. 88(3)). Statistics regarding hearings in Winnipeg, from the years 1977 and 1979 indicate that the mean time from the filing date to the date of decision was 60 days. Should a Notice of Objection be filed, however, the action is heard under Part I of "The County Courts Act", and a decision takes considerably longer. In the County Court of Winnipeg (1979), for instance, more than one-half of the cases transferred to be heard under Part I were decided more than 100 days after the Notice was filed and almost one-third were decided more than 150 days later.[19]

2.18 The problem of enforcing judgments is, by no means, unique to the small claims court. However, special care should be given in small claims court to provide information to self-represented parties regarding the availability of and the procedure for garnishment orders, writs of execution, and so forth, so that their judgments are more likely to be effective. We understand that assistance is often given informally by helpful County Court

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[18] Banks and credit unions were plaintiffs in 6.2% of all the claims filed in 1979 in the County Court of Winnipeg.

[19] Of the 16.6% of small claims which go to trial after a Notice of Objection is filed, 8.70/16.6 = 52.4% were decided more than 100 days after the filing of the Notice of Objection and 5.2/16.6 = 31.3% were decided more than 150 days after the filing of the Notice of Objection.

clerks in preparing garnishment orders and writs of execution for judgment creditors in the small claims court.

(d) The quality of justice

2.19 As we have said earlier in this Chapter, a small claims court, like any court, should be governed by a duty of fairness and bound by the rule of law; the quality of justice should not be, nor be perceived to be different from that dispensed in other courts. The clerks serving as adjudicators in the current system have striven admirably to meet these standards and their conscientious service merits grateful acknowledgement. The fact remains, however, that although the monetary size of a claim may be small, its legal and factual complexity may be substantial. This is even more likely to be so if the monetary limit of small claims court is raised. The public perception of the court is also very important. How can a small claims court be seen to be dispensing the same quality of justice as the others if the qualifications of its adjudicators are considerably less stringent? The subject of the appropriate qualifications of small claims adjudicators is examined later in this Report. Suffice it to say here that the fact that adjudicators presently have no formal legal training may raise the unfortunate impression that the quality of justice to be expected in small claims is different from that provided in other judicial processes.

2.20 Aside from these improvements which can be made to the existing court, there is the more practical issue of the organization of a small claims system in the event the Court of Queen's Bench and the County Courts of Manitoba are merged to form one superior court of general jurisdiction, as we recommended in Part I of this Report. The question which must be addressed is whether the small claims court should be part of this new superior court or of another, or whether small claims should be handled by an independent court. We have assumed thus far in this Report that small claims should be conducted within a court structure but there remains the broader question as to whether an administrative tribunal or other structure would provide for a more appropriate forum for the adjudication of small claims. These questions concerning the organization of the new court are examined in the succeeding Chapter, as are

the more specific issues pertaining to the overall improvement of the system insofar as its simplicity, accessibility and effectiveness are concerned.

CHAPTER 3

RECOMMENDATIONS FOR REFORM

Overview

3.01 Chapter 3 outlines the proposed structure of the small claims court in terms of its place in the legal system in Manitoba, the type of forum to be recommended and the procedures to be followed. Our recommendations concerning the specific aspects of the structure of the Court and its practice and procedure are made in light of the objectives discussed in Chapter 2.

Possible Structures

3.02 The Commission has considered whether small claims should continue to be adjudicated by a court or whether there is a more appropriate forum for the hearing of these disputes. The options in lieu of a court structure which we have considered are as follows:

(1) mediation;
(2) arbitration;
(3) adjudication by a provincial administrative tribunal.

In the following paragraphs, we compare each of these systems with that of the traditional court structure.

3.03 Mediation can be a successful method of resolving disputes but it can only be effective alongside one of the other systems. In mediation a third party acts as a catalyst in bringing parties to their own solution. The decision is a consensual one in that it is reached via the agreement of all the parties to the dispute. It is obvious that under a mediation programme there would be litigants who would not be able to reach agreement while others would not even wish to submit to the mediation process. If mediation is to operate,

therefore, it must exist as an adjunct to an adjudicative system.

3.04 Arbitration[20] and adjudication by a special administrative tribunal[21] have also been studied. The structure of an arbitration board or an administrative tribunal could allow for a simplified process of decision making but we do not think that court procedure need be, comparatively speaking, any more complicated. Nor do we think that there would be any greater assurance of accessibility and effectiveness in an arbitration or administrative tribunal structure. There is also the cost of the administration of justice to consider, and, although we have not had the resources to conduct a comparative cost analysis, we have no reason to believe that either an arbitration board or an administrative tribunal which conducts hearings throughout the province would be any less expensive to administer than a court.

3.05 A court structure has the benefit of being familiar to most Manitobans. Assuming the court was appropriately structured and organized, it would also likely share the high degree of authority and prestige associated with the other courts in the province. Considering these factors, and the further point that the choices in lieu of a court system are not of themselves superior or distinctive in any respect, we are of the view that the adjudication of small claims should continue to be heard by a court rather than by another structure or process. We accordingly recommend:

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[20] Arbitration is "An arrangement for taking and abiding by the judgment of selected person[s] in some disputed matter, instead of carrying it to established tribunals of justice, and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation." Black's Law Dictionary (5th ed.) at 96.

[21] The type of administrative tribunal we considered would follow generally the practice and procedure of existing provincial boards which adjudicate individual rights through compensation schemes, such as the Workers' Compensation Board.

RECOMMENDATION 1

That the adjudication of small claims continue to be heard by a court rather than by an administrative tribunal, mediator or arbitrator.

Qualifications of the Adjudicators

3.06 We stated in Chapter 2 that we felt it was important for the small claims court to be constituted in such a manner that no inference can be raised that the quality of justice received by litigants in this court is different from that available in the other Courts. We also concluded that the court should be governed by rules of procedural fairness and by the rule of law. In order to achieve these and other objectives, the Commission is of the view that it is essential that the adjudicators in the small claims court have legal training.

3.07 Legally-trained adjudicators would be better able to assist self-represented litigants during the course of a hearing in that the contentious issues could be more clearly defined and the manner of introducing viva voce (oral) evidence be subject to greater supervision or control. Experience elsewhere would suggest that claims can be handled more expeditiously when the adjudicators are legally-trained. Legal training also encourages decisions to be governed by principles of law and so to promote greater consistency between judgments. Primarily, however, legal training is essential because of the importance of the concept of equality before the law and the fact that the court system must not be seen to be administering a different form of justice for claims of lower sums.

3.08 We favour the legally-trained adjudicators to be full-time judges rather than lawyers sitting on a part-time, rotational basis. It is our view that the appointment of full-time judges is preferable because it would encourage a more developed degree of expertise in the conduct and adjudication of small claims than would the appointment of lawyers sitting on a part-time rotational basis. The appointment of full-time judges is also more consistent

with the notion of an independent and professional judiciary. It would also bring an element of prestige and authority to the small claims court to have full-time judges that would not be as evident with lawyers appointed on a part-time basis. We accordingly recommend:

RECOMMENDATION 2

That the small claims court have legally-trained adjudicators.

Organization of the Court

3.09 The Commission has considered three options in determining the appropriate place for the small claims court within our administration of justice system. The court could be associated with the new Court of Queen's Bench or the Provincial Judges Court; or it could be structured independently of the other courts in Manitoba. The advantage in joining it to one of the existing courts is that it would inherit the authority and prestige of that court and, accordingly, would not have to establish its own credibility. A further benefit of associating it with an existing court is that it could share the administration of that court and thus the initial cost of implementation could be reduced. A disadvantage in associating the small claims court with an established court is that it might be administered in the same manner as the original court and thus adopt too formal an approach. Special care would have to be taken by the judges and the administration to ensure that the small claims court developed its special status as a court conducive to self-representation.

3.10 A small claims court operating independently from an established court would be more costly to administer. The expense could be justified if there were a sufficient volume of cases but it is unlikely that a distinct bench of small claims judges could be warranted, even when the expanded jurisdiction and other factors improving accessibility are taken into consideration.

3.11 We have concluded that small claims court should be established by the means of a separate civil division in the Provincial Judges Court. We think that the Provincial Judges Court has several advantages over the new Court of Queen's Bench as the court with responsibility for small claims. Provincial Judges Court has many more hearing centres throughout the province than the Queen's Bench, and therefore would be more accessible, especially in rural and northern regions. Furthermore, the Provincial Judges Court system has more experience in dealing with matters speedily despite the high volume of cases which come before it. In addition, the adjudication of small claims by Provincial Judges Court is provided for in a number of other provinces, from whose experience valuable lessons and precedents could be drawn.[22] A separate civil division of the Provincial Judges Court would be appropriate as it would encourage the court to develop its own specially formulated rules of practice and procedure. It would also ensure that a large burden would not be cast on the other divisions of the Provincial Judges Court except to call upon their resources and experiences when necessary.

3.12 The Commission has received an opinion from Prof. R. Dale Gibson as to whether it would be constitutionally valid to transfer the jurisdiction of the adjudication of small claims from the County Courts to the Provincial Judges Court. The constitutionality of such a transfer is relevant primarily because judicial appointments to the County Courts and the Provincial Judges Court are respectively within the powers of the federal and the provincial orders of government. The power of the federal government to appoint judges to the County Courts is found in section 96 of the Constitution Act, 1867 and extends to the appointment of judges to the "Superior, District, and County Courts in each Province". Jurisprudence has held generally that provinces exceed their jurisdiction when they bestow functions upon provincial court judges which are in substance those which have belonged exclusively to federally-appointed judges. It is the view of Prof. Gibson that, subject to monetary limits and certain restrictions to be discussed later, it is within the power of the

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22 British Columbia, Alberta, Saskatchewan, Ontario, Quebec and Newfoundland have all established Provincial Judges Courts to adjudicate small claims.

province to create a small claims court and appoint judges to adjudicate claims commenced in that court.

We accordingly recommend:

RECOMMENDATION 3

That the small claims court be associated with an existing court and that this court be the Provincial Judges Court.

RECOMMENDATION 4

That a separate Civil Division of that court be created for the adjudication of small claims.

RECOMMENDATION 5

That the court for the adjudication of small claims be called the Provincial Judges Court (Civil Division).

Jurisdiction

(a) Exclusive jurisdiction

3.13 We stated earlier in this Report that the defendant has the right to object to the small claims forum and have the action transferred to Part I of "The County Courts Act". The jurisdiction of the present court is not exclusive in a further respect. That is, a plaintiff may institute his or her action under Part I of "The County Courts Act", or in the Court of Queen's Bench, for that matter, even if the amount of the claim does not exceed $1,000. Each party to the adversarial system, therefore, has the right to decide whether to use the small claims system.

3.14 The Commission has considered whether it would be appropriate to confer exclusive statutory jurisdiction on the Provincial Judges Court (Civil Division). We have studied this option because we are concerned with a recent study (1979) which indicated that where a defendant opts for a transfer to Part I of the Act, less than one out of five plaintiffs continues his or her claim.[23]

3.15 Concurrent jurisdiction for small claims may be justifiable where small claims are adjudicated by non-legally trained clerks, for litigants should be entitled to have their rights decided in the same manner as the higher courts. However, under our proposal, a Provincial Judges Court (Civil Division) would be served by legally trained judges who will have gained expertise in adjudicating small claims for self-represented litigants in accordance with the rule of law. The argument in favour of continuing non-exclusive jurisdiction for small claims is therefore considerably weakened.

3.16 There is also the stature and authority of the court to consider. It would be difficult to escape the unfortunate impression that the quality of justice received by litigants in the Provincial Judges Court (Civil Division) is inferior to that available in the Court of Queen's Bench if there were a large area of jurisdiction common to both. Based upon these reasons, we generally favour the jurisdiction of the Provincial Judges Court (Civil Division) to be exclusive.

3.17 We have considered whether there should be any exceptions to the exclusive jurisdiction of the Provincial Judges Court (Civil Division) and, if so, the nature of these exceptions. We have concluded that there should be three exceptions to the exclusive jurisdiction of the Provincial Judges Court (Civil Division), which are as follows:

(1) There should be the right to transfer an action to the Court of Queen's Bench where there is the consent of all of the

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23 Supra n. 19.

parties to the action. A similar provision to this is found in s. 25.2(1) of "The Provincial Judges Act" in regard to transfers from the Provincial Judges Court (Family Division) to a County Court or to the Court of Queen's Bench.

(2) In cases where the defendant pleads a set-off or counter-claim, any party should have the right to apply to the Provincial Judges Court (Civil Division) for an order transferring the action to the Queen's Bench on the ground that the set-off or counter-claim involves a matter beyond the jurisdiction of the new Court. Subsection 43(1) of "The County Courts Act" contains a comparable provision with respect to the transfer of an action involving a set-off or counter-claim from a County Court to the Court of Queen's Bench.

(3) There may be exceptional cases which would be more appropriately dealt with in the Court of Queen's Bench. Included within this category, for example, would be cases which, because of their intricacies, are judged not to be especially suited to the expeditious and summary process of the Provincial Judges Court (Civil Division). To meet these exceptional cases, we think that any party should have the right to apply for a transfer of the action on the grounds that, having regard to the exceptional circumstances of the case, it would be proper for a transfer to be ordered.

We have discussed whether the application for transfer in this third exception should be made to the Provincial Judges Court (Civil Division) or whether it would be proper for the application to be made to the Court of Queen's Bench. We have concluded that the Provincial Judges Court (Civil Division) is the more appropriate forum in which to apply for a transfer of an action, for the following reasons. First, we think that the provincial court judges would be

more knowledgeable of the practice and procedure of small claims court and would, accordingly, be better qualified to assess the suitability of a given case to be governed by its summary judicial process. Second, it is likely that the majority of litigants bringing or defending actions in this Court will be self-represented and we think that, for such persons, the informality of the Provincial Judges Court (Civil Division) would allow for a more suitable forum.

We recommend:

RECOMMENDATION 6

That, subject to the exceptions set forth in Recommendation 7, the jurisdiction of the Provincial Judges Court (Civil Division) be exclusive.

RECOMMENDATION 7

That the Provincial Judges Court (Civil Division) be given the statutory authority to transfer an action to the Court of Queen's Bench on the application of any party to an action in the following cases:

(1) where there is the consent of all of the parties to the action, in which case the transfer shall be ordered;

(2) where the defendant pleads a set-off or counter-claim and the Court is satisfied that the set-off or counter-claim involves a matter beyond the jurisdiction of the Court; or

(3) where the Court is satisfied that, having regard to the exceptional circumstances of the case, it would be proper to do so.

(b) Monetary jurisdiction

3.18 The Commission has considered what maximum monetary jurisdiction to give to the Provincial Judges Court (Civil Division). In its consultations with members of the Bar, the Study Group heard suggestions for an upper limit which ranged from $2,000 to $5,000.[24] As quoted earlier in our Report, we were also informed by members of the legal profession that it may cost up to $3,000 in legal fees and disbursements for a party to try an action under Part I of "The County Courts Act".[25]

3.19 Legislative reforms introduced in recent years elsewhere in Canada have expanded the monetary jurisdiction of the small claims court considerably. In New Brunswick and Metropolitan Toronto, for example, the monetary jurisdiction has been raised to $3,000, while in Nova Scotia, Prince Edward Island and British Columbia, the limit has been set at $2,000.

3.20 There are three important matters to consider in determining an upper limit for the Provincial Judges Court (Civil Division) in Manitoba. The first is to ensure that its jurisdiction is expansive enough that it includes those claims that would not be large enough to retain legal counsel. The second consideration is to ensure that the jurisdiction is not so high that the ability of parties to represent themselves is substantially decreased. Otherwise, the system may tend to become more formalized and, consequently,

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[24] The suggestions for an upper limit from members of the following District Bars were as follows: from the Portage la Prairie District Bar, $2,000-$2,500; the Northern District Bar (The Pas and Flin Flon), $5,000; the Western District Bar, $3,000; the Northern District Bar (Thompson), $2,000; the Dauphin District Bar, $5,000.

[25] See supra n. 13.

less conducive to self-representation. The third matter to consider is the extent of monetary jurisdiction which reasonably can be bestowed upon a Provincial Judges Court, having regard to the restrictions imposed by section 96 of the Constitution Act, 1867 , as earlier explained.

3.21 In examining the first two factors just cited, we have concluded that the Provincial Judges Court (Civil Division) should have the jurisdiction to hear claims up to $3,000, exclusive of interest. We are also satisfied from the advice we have received from our constitutional consultant, Prof. Gibson, that $3,000 would be a permissible amount to confer upon provincial court judges. We accordingly recommend:

RECOMMENDATION 8

That the maximum monetary jurisdiction of the Provincial Judges Court (Civil Division) be $3,000, exclusive of interest.

3.22 Presently, small claims court has jurisdiction over any matter within the jurisdiction of the County Courts of Manitoba where the amount involved does not exceed $1,000. The authority of the County Courts extends to:

- contracts;
- debts;
- torts except malicious prosecution and false imprisonment (these two exceptions are generally tried before a judge and jury: "The Queen's Bench Act" s. 66(1));
- recovery of personal property including actions of replevin and detinue;
- interpleaders; and
- trespass or injury to land.

Express prohibitions include:

- actions for injunctions;

- specific performance of contracts;
- foreclosure or sale of mortgaged premises;
- ejectment;
- recovery of land;
- administration of estates or trusts; or
- trying the validity of any devise, bequest or limitation.[26]

3.23 As the Provincial Judges Court (Civil Division) will be an inferior court,[27] it will be necessary to define its jurisdiction in the reform legislation. We have reviewed the authority of the small claims courts in other provinces. We have also given consideration to the powers which have traditionally been exercised by judges of the county or superior courts so as not to offend any constitutional restrictions which might be imposed upon provincially-appointed judges. Based upon the foregoing, we recommend:

RECOMMENDATION 9

That the jurisdiction of the Provincial Judges Court (Civil Division) be as follows:

> The Court, in addition to the jurisdiction given by any Act having the force of law in the province, has jurisdiction in
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> (a) any claim or counterclaim for debt (whether payable in money or otherwise) or damages (including damages for

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[26] Clause 27(1)(b) of "The County Courts Act" does not exclude a defamation action from the jurisdiction of the County Courts. We do not think that the Provincial Judges Court (Civil Division) should be empowered to hear defamation actions and this view is reflected in Recommendation 9 of our Report.

[27] An inferior court is "a court of special, limited, or statutory jurisdiction, whose record must show the existence and attaching of jurisdiction in any given case, in order to give presumptive validity to its judgment". Black's Law Dictionary (5th ed.) at 700.

breach of contract) where the amount claimed does not exceed $3,000 exclusive of interest;

(b) any action of replevin where the value of property distrained, taken or detained does not exceed $3,000; and

(c) interpleader proceedings where the value of the property in dispute does not exceed $3,000.

The Court has no jurisdiction in an action

(a) in which the title to land is brought into question;

(b) in which the validity of any devise, bequest or limitation is disputed;

(c) for the administration of estates or trusts;

(d) for malicious prosecution, false imprisonment, defamation; and

(e) against any judge, justice of the peace or peace officer for anything done by him while executing the duties of his office.[28]

The court has no jurisdiction to award an injunction or specific performance.

Composition of the Bench

3.24 We are not in a position to assess the effect the reforms recommended in this Part of the Report will have upon the volume and pattern of small claims filings and hearings throughout the province. We hope, however, that the following comments and observations may be of assistance:

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[28] Although section 12 of "The Provincial Judges Act" exempts "a judge, magistrate, or justice of the peace for any act done by him in the execution of his duty", the exemption does not extend to acts "done maliciously and without reasonable and probably cause".

- initially, two or three full time small claims court judges could be appointed or assigned to the Civil Division: one resident in Winnipeg; a second bilingual judge resident in St.Boniface; and perhaps a third judge resident in Brandon. The Civil Division judges would develop special experience and give overall direction to the development of the small claims system.

- to the extent that time permits, the full-time judges of the Civil Division could participate in a judicial circuit system within the general area of the judicial centre of his or her residence;

- in centres outside of Winnipeg, St.Boniface and Brandon, the full-time judges could be assisted by provincial judges of the Criminal and Family Divisions who, in their regular work, sit in a large number of places. Consultation with the Chief Provincial Court Judge would be required in scheduling the appropriate circuits.
- in the major centres, filing offices could be established, separately or in conjunction with the Court of Queen's Bench.[29] To foster use of the Court in more remote areas, filings by mail should be permitted and telephone consultations encouraged.

Auxiliary Services

(a) Pre-trial preparation

3.25 As small claims court is intended to be structured for self-representation, it is important that services are available to assist litigants in the preparation of their trials. Presently, hearings may be longer and less structured than they need be, and relevant evidence may be omitted, because

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[29] The Provincial Judges Court presently has separate court offices in Winnipeg, Brandon, Portage la Prairie and Steinbach. Elsewhere, the court offices serve the Provincial Judges Court and the County Courts.

self-represented litigants are unaware of the trial process and the facts to tender in support of their case. We think that clerks should inform litigants of the small claims process generally and summarize courtroom practice and procedure so as to allow the litigants to be better prepared. This would allow cases to be conducted more efficiently and thereby reduce the requisite amount of "bench time". Since litigants will have been advised on the procedure of the Court, there should also be fewer adjournments and dismissals resulting from the absence of an important witness or document, than is the case presently.

3.26 It is also important that clerks assist successful parties in the enforcement of their judgments, where necessary. Instruction could include the choices of enforcement available and the manner of obtaining their execution. This task is presently performed by many County Court clerks who have recognized the need to assist self-represented parties in this regard. We recommend:

RECOMMENDATION 10

That the clerks employed by the Provincial Judges Court (Civil Division) inform litigants of the procedure of the Court and assist successful parties in the enforcement of their judgments, when necessary.

(b) Mediation Services

3.27 Mediation is the settlement of a dispute between two contending parties by the action of a neutral intermediary. Mediation has traditionally been associated with the resolution of labour disputes. More recently, however, it has been used elsewhere, on an experimental basis, as a corollary to the court system for the resolution of minor civil disputes. For example,in March 1982, the Quebec government established an experimental mediation service in Montreal at the small claims court level. The experiment is limited to the

mediation of contractual cases under $500, for a one year period. From our correspondence with Le Ministere de la Justice, in Quebec, we have been informed that 73.8% of the cases heard have been settled successfully through mediation.[30] The success of the Quebec experiment is echoed by the Windsor-Essex Mediation Centre in Windsor, Ontario, which was established by the Canadian Bar Association in November, 1981. The purpose of this Centre is to test mediation techniques in the resolution of minor civil disputes on a two-year pilot basis.[31] The Executive Director of the Centre has informed us that, of the cases referred to the Centre, 95% have been resolved through mediation and it has been learned that 87% of those agreements have resulted in permanent and lasting solutions through a follow-up programme.[32]

3.28 Although it is too early to reach any conclusions on the success of mediation to resolve minor civil disputes, there appear to be several benefits arising from a mediation programme. First, it can reduce a litigant's cost of bringing or defending an action because it makes the preparation for trial and the conduct thereof unnecessary. Second, the cost of the administration of justice for small claims may be reduced given that, at least based upon the evidence adduced so far, the amount of "bench time" required is significantly reduced. Third, the not uncommon problem of enforcing judgments obtained through the adjudicative process is minimized. It must, however, be realized that mediation can never be a sole solution to the adjudication of minor civil disputes. Disputes will not always be successfully resolved through mediation. The process is also a consensual one and some parties may not agree to enter into mediation. This latter point is evidenced by the mediation system in Montreal where 34% of plaintiffs eligible for mediation service have

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[30] Letter dated December 10, 1982 from E. Robert Iuticone, Mediator with la Cour Provinciale: Division des petites creances.

[31] The Centre was established with financial assistance from The Donner Canadian Foundation.

[32] Letter dated November 12, 1982 from Russell L. Horrocks, Executive Director of The Windsor-Essex Mediation Centre.

rejected the opportunity to mediate.[33]

3.29 The particular procedure adopted for mediation in the Windsor-Essex Mediation Centre depends upon whether the plaintiff has compromised his or her claim by the mediation process. That is, if the plaintiff accepts an award for less than the amount (s)he has claimed, minutes of settlement are prepared by the mediator, signed by the parties to the action and endorsed by a judge of the court. An order is then signed and entered by the court. Where the defendant agrees to the plaintiff's claim in full, no minutes of settlement are prepared; instead, the court order is simply signed and entered, with the consent of the parties. In either instance, if the defendant is unable to satisfy immediately the judgment in full, an appropriate payment schedule is drawn; so long as the defendant complies with this schedule, the plaintiff is not entitled to enforce judgment for the full amount which is outstanding.

3.30 In one sense, a mediation programme for small claims is not that innovative a measure. Where actions are commenced in the higher, more formalized courts, lawyers, broadly speaking, have performed the task of mediation in that they often seek to settle their client's case so as to avoid the expense of a trial. From this perspective, mediation can be seen as a necessary feature of a small claims court because it is especially designed for self-represented litigants.

3.31 Mediation of small claims disputes in other jurisdictions is only in the experimental stage. It would, therefore, be inappropriate for us to propose the implementation of a mediation service throughout the province. Instead, we favour the introduction of a mediation service in Winnipeg, or another urban centre, on a pilot basis, after which time an assessment can be made as to the feasibility of its adoption in Manitoba on a selected or province-wide basis. There has already been established in the private sector free mediation services for resolving civil and criminal disputes through Mediation Services

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[33] "The Canadian Bar Association National", June, 1982 at 16, col. 3.

of Winnipeg.[34] With their assistance, we think that a pilot project could be implemented rather inexpensively in Winnipeg. We accordingly recommend:

RECOMMENDATION 11

That a mediation programme be established in Winnipeg, or another urban centre, on a pilot basis, for the purpose of resolving claims commenced in the Provincial Judges Court (Civil Division), from which the feasibility of a province-wide mediation system can be assessed.

3.32 We offer the following further comments concerning the operation of a mediation service in Manitoba:

- mediation is especially appropriate for claims where the relationship between parties is continuous, such as with landlords and tenants, as opposed to relationships which are "one-shot" or episodic.

- it would be essential for the mediators on the pilot project to work closely with the clerks on staff so that where mediation fails, the parties have the opportunity to meet with a clerk to prepare themselves for trial.

- it would be especially appropriate for the mediator to receive special training in mediation techniques.[35] Mediation Services of Winnipeg might be willing to assist in this regard.

- for mediation to be successful, we have been informed that promotion

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[34] Mediation Services of Winnipeg was established by the Mennonite Central Committee and its co-ordinator is Mr. Murray Barkman, 202-818 Portage Avenue.

[35] In the Windsor-Essex Mediation Centre, the mediators underwent a twenty-hour training session at the Neighborhood Justice Center of Atlanta, Georgia.

and community awareness is critical to the success of the project. In other mediation projects, the staff has been actively involved in publicizing and promoting their existence.

Procedural and Administrative Matters

(a) Admissible evidence

3.33 As a small claims court is specifically designed for self-representation, it would be inappropriate for technical rules of evidence, such as hearsay, to apply as they do in the higher formalized courts. Instead, the basic principle regarding the admissibility of evidence should be relevancy. That is, all evidence that is relevant should be admissible so long as it is not privileged evidence or evidence that is rendered inadmissible by any statute. This is also the provision regarding the rules of evidence in the small claims court of Ontario[36] and Nova Scotia.[37] We recommend:

RECOMMENDATION 12

That the rules of evidence be not strictly applied in the Provincial Judges Court (Civil Division); but that everything relevant be admissible except privileged evidence and evidence that is made inadmissible by statute.

3.34 As it is essential that the parties discuss their cases freely and openly with the mediator to mediate successfully their dispute, it should be provided that all communications made by parties during the course of

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36 "Small Claims Court Act" R.S.O. 1980 c. 476 s. 98.

37 "Small Claims Court Act" S.N.S. 1980 c. 16.

mediation are without prejudice and absolutely privileged. Similarly, the mediator should not be a competent or compellable witness in regard to statements or communications made to him or her during the course of mediation. A similar provision regarding the competency and compellability of marriage counsellors in proceedings under "The Family Maintenance Act" C.C.S.M. c.F20 is found in s.22(2) of that Act. We recommend:

RECOMMENDATION 13

That the legislation provide that all communications made by the parties during the course of mediation are without prejudice and absolutely privileged.

RECOMMENDATION 14

That the legislation provide that a mediator is not competent or compellable to give evidence for or against any party with respect to statements, admissions or communications made to a mediator during the course of mediation.

(b) Restrictions on the use of the Court

3.35 Some jurisdictions prohibit corporations and collection agencies from filing claims in small claims court in order to make the court a consumer's court. Unlike these jurisdictions, we do not think that there should be any restrictions on the type of plaintiff that may commence an action in the Provincial Judges Court (Civil Division). Such restrictions prejudice the defendants in these actions who may not have the resources to defend their rights in the Court of Queen's Bench. They might also be held to be unconstitutional in view of s. 15 of the Canadian Charter of Rights and

Freedoms ("Charter") which guarantees equality "before and under the law".[38]

3.36 There are also jurisdictions which prohibit the use of legal representation in small claims court for the express aim of ensuring that the practice and procedure of this court will be designed for the self-represented. To a large degree, we think that the use of lawyers in small claims court is self-regulating because most litigants will not be able to afford retaining counsel for claims of small sums. There is also the constitutional validity of a denial of legal representation to consider given that section 7 of the Charter could be interpreted as guaranteeing the right to counsel.[39] We accordingly recommend:

RECOMMENDATION 15

That no class of plaintiff be excluded from the Court.

RECOMMENDATION 16

That there be no restriction on the representation of parties by barristers and solicitors.

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[38] Section 15 of the Charter does not become operative until 1985. While it is true that the English text of section 15 refers too "individuals" and therefore would not seem to apply to corporations, the French text is broad enough to include corporations. As to the applicability of other sections of the Charter to corporation, see Southam Inc. v. Director of Investigation and Research of the Combines Inv. Branch [1982] 4 WWR 673 (Alta. Q.B.), rev'd (not yet reported) #15502/83 and #15529/83 (Alta. C.A.); See also Balderstone v. R. [1983] 1 W.W.R. 72 (Man. Q.B.).

[39] Section 7 of the Charter reads as follows: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

(c) Pre-trial procedures

3.37 Presently, "The County Court Act" does not permit any pre-trial procedures for small claims such as examinations for discovery and notices for discovery of documents which are generally prevalent for actions commenced and defended in the Court of Queen's Bench or a County Court (Part I).

3.38 We think that there should be some provision made for examinations for discovery and for the production of documents in the Provincial Judges Court (Civil Division). In particular, we think that the Court should have the discretion to order an examination for discovery and the production of documents where it is satisfied that the special circumstances of a case make it necessary in the interests of justice. A comparable provision for claims over $1,000 is contained in Rule 42 of the small claims court in Metropolitan Toronto, which is reproduced in the Appendix to this Report. Unlike the Ontario Rule 42, however, we do not think that the right to apply for these pre-trial procedures should be restricted to claims over $1,000 or any other fixed sum; rather, the right to apply should be allowed regardless of the monetary size of the small claim. We recommend:

RECOMMENDATION 17

That the Provincial Judges Court (Civil Division) have the authority to order an examination for discovery and a discovery of documents for any action within the jurisdiction of the Court where the Court is satisfied that the special circumstances of a case make it necessary in the interests of justice to do so.

(d) Default Procedures

3.39 Where a defendant fails to file a statement of defence to a claim commenced in the Court of Queen's Bench or the County Court (Part I), (s)he is considered to be in default and judgment may be entered against the defendant

in either Court.[40] There is no procedure under Part II of "The County Courts Act" for a plaintiff to enter a default judgment against the defendant. This is because under the current system a defendant does not file a statement of defence, but rather must merely attend at the time of hearing to raise his or her defence to the action.

3.40 The Commission has studied whether a plaintiff should have the right to enter default judgment against the defendant in the Provincial Judges Court (Civil Division). This is a very difficult issue to resolve. On the one hand, it is admittedly cumbersome and time-consuming for plaintiffs, especially in rural areas, to attend at trial to prove what may be a straight-forward debt. On the other hand, however, it may be difficult in a self-represented system to determine in advance which claims are straight-forward and without defence. In particular, some self-represented defendants may be unaware of the fact that they have a defence until they attend at the hearing or at least become involved in pre-trial preparation. There is also evidence that some plaintiffs' claims are inflated: in the small claims court of Winnipeg, in 1979, for example, 14% of the small claims that were adjudicated upon were only allowed in part.[41]

3.41 Given the possibility of exaggerated or unfounded claims, we have concluded that initially it would be preferable not to adopt a default procedure similar to that which takes place in the Court of Queen's Bench. We have also considered, as an alternative to that default procedure, a proof of claim system such as that adopted in the County Court Rules with respect to claims under $2,000.[42] Again, however, we do not think that such a system

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[40] Where the plaintiff's claim is for a debt or liquidated ("sum certain") demand, or for the recovery of chattels, final judgment may be entered; otherwise judgment will be interlocutory only as the plaintiff must prove to the court the amount of his or her claim. See Queen's Bench Rule 34 ff.

[41] Of the 2487 claims adjudicated in the small claims court of Winnipeg in 1979, 348 were allowed only in part.

[42] Where a claim under $2,000 is commenced under Part I of "The County Courts
(CONTINUED)

would provide adequate protection to self-represented defendants. Experience may show, however, that some affidavit evidence or other default procedure is possible so that a plaintiff need not personally appear at a hearing for a claim to which there is no defence. It might also be found to be appropriate to require defendants who wish to object to their claims to file a notice of intent to defend with the Court within a specified time period, as is the case with small claims in Ontario and British Columbia. This practice would mean that only those claims which are truly contested would be subject to the requirement of formal proof at a hearing. To facilitate the amendment of the provisions regarding default procedure, we think that these should be incorporated in the rules of the Provincial Judges Court (Civil Division). This would enable the provincial court judges to assess their adequacy and to improve the procedures pertaining to default in response to the new Court's experience. We recommend:

RECOMMENDATION 18

That in the Rules of Court initially adopted, the current default procedure in the small claims court requiring proof of claim and amount at trial be retained.

(e) Setting aside judgment

3.42 There is no special procedure in the small claims court for a defendant to set aside a judgment when (s)he has not attended at the small claims hearing. Instead, the defendant is currently permitted an appeal by way

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[42] (FOOTNOTE CONTINUED)

Act" and served by registered or certified mail, a plaintiff is not entitled to enter default judgment until he submits affidavit evidence in accordance with the Practice Direction set out in Schedule A to the County Court Rules, En. M.R. 214/79.

of trial de novo. We are of the opinion that there should be a special procedure to vary or set aside a default judgment, similar to Queen's Bench Rule 458.[43] This would allow the small claims court the right on motion of the defendant to set aside or vary a judgment on such terms as may be just. Similar provisions are also found in the small claims court legislation of Ontario[44] and Alberta[45] We therefore recommend:

RECOMMENDATION 19

That the Provincial Judges Court (Civil Division) have the jurisdiction to set aside or vary a judgment by default on such terms as may be just.

(f) Appeal procedures

3.43 It is important that the decisions of the Provincial Judges Court (Civil Division) be subject to review by an appellate tribunal. There is some jurisprudence to suggest that legislation will be considered unconstitutional if it purports to insulate decisions of any court or tribunal from review by a higher court, at least with respect to those decisions which pertain to the jurisdiction of an inferior court or tribunal. (See, for example, Crevier v. A.-G. Quebec (1981) 127 D.L.R. (3d) 1 (S.C.C.)).

3.44 Presently the decisions of the clerks in the small claims system are

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[43] Queen's Bench Rule 458 states that "The Court may set aside or vary a judgment by default on such terms as may be just."

[44] S. 89(4) of the "Small Claims Court Act", R.S.O. 1980 c. 476 states that "The judge may set aside the judgment and permit the case to be tried on such terms as to him seem just."

[45] S. 55 of the "Provincial Court Act" R.S.A. 1980 c. P-20 states that "The Court may, on any terms it considers proper, set aside or vary any judgment entered by default."

subject to an appeal on any ground. The appeal is by way of trial de novo ("new trial") in a County Court. As a trial de novo on unlimited grounds is expensive and time-consuming (both for the litigant and for the court system), there is no need for the continuance of this present appeal structure unless there are strong reasons for its inclusion in the new court system. As small claims disputes are to be decided by legally trained judges in accordance with the rule of law and principles of natural justice, we do not see any justification for the retention of the present appeal structure.

3.45 The choices available for an appeal procedure are generally two-fold. The appeal could be by way of stated case or it could be an appeal on the record. Although an appeal by way of stated case is a relatively simple appeal procedure, its critics suggest that it forces an appeal court to review a case "without adequate factual underpinning".[46] An appeal on the record would, in our view, be a more satisfactory procedure. It would, however, require a transcript. This need not involve considerable expense; in Saskatchewan, for example, the judges personally operate a tape recorder so that a court clerk need not be present.

3.46 Some jurisdictions, such as Nova Scotia, confine the grounds of appeal of small claims decisions to questions of law and to cases where an excess of jurisdiction or a denial of natural justice is alleged. Others, such as British Columbia, extend the grounds broadly to law or to fact. We think that the grounds of appeal should be confined to law or mixed fact and law. This would provide the appellate court with sufficient jurisdiction to ensure that cases are decided fairly in accordance with the rule of law but not extend so broadly as to include issues of fact alone. The small claims clerks should inform a party who wishes to appeal of the limits of the right of appeal and of the procedure involved, when so requested.

3.47 The proper appeal forum is a more difficult question to resolve.

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[46] R. v. Dutch Maid Dairy and Ice Cream Co. Limited [1981] 3 W.W.R. 567 (Man. C.A.) at 568-9, per Monnin, J.A.

Appeals from decisions rendered by the Provincial Judges Court generally proceed to the Court of Appeal. We do not think that the Court of Appeal should be the immediate appeal forum for self-represented litigants. Instead, we favour a right of appeal on law or mixed law and fact to the Court of Queen's Bench.[47] (The Court of Queen's Bench will also exercise supervisory control over the Provincial Judges Court (Civil Division) as part of its inherent jurisdiction). Leave of the Court of Appeal should be required in order to appeal the decision of the Court of Queen's Bench.[48] We recommend:

RECOMMENDATION 20

That there be a right to an appeal from a decision of the Provincial Judges Court (Civil Division), on law or mixed law and fact, to the Court of Queen's Bench.

RECOMMENDATION 21

That leave of the Court of Appeal of Manitoba be required to appeal the decision of the Court of Queen's Bench.

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[47] The Court of Queen's Bench, or its equivalent, is also an appeal forum for small claims decisions in Saskatchewan, Alberta, and British Columbia. In Ontario, the Divisional Court is used.

[48] Rule 75.20(2) of the Judicature Act R.S.N.B. 1973 s. 73, am. S.N.B. 1979 c. 36; further am. S.N.B. 1982 c. 34 provides for the following provision regarding leave to appeal of small claims decisions:

> (2) The Court of Appeal may grant leave to appeal if
> (a) the judgment appealed from was wrong on a question of law and that there is a matter of general importance to be determined, or
> (b) the conduct of the proceeding was so unfair to the appellant as to constitute a miscarriage of justice.

(g) Costs

3.48 Presently, a successful party may be awarded costs to a maximum of 10% of the judgment sum plus disbursements in an amount not to exceed 20% of the judgment amount. We think that the successful party should be allowed filing, service and witness fees and disbursements generally where the Court finds them to be reasonable and necessary. The issue as to whether the Court should be able to award counsel fees is more difficult to resolve. Some provinces, such as British Columbia[49] and Saskatchewan,[50] do not allow their small claims court to award counsel fees. Others allow such fees but restrict the amount. In Ontario, for example, the court may award a counsel fee for contentious disputes over $200 but only to a maximum of $50.[51] We think that, generally speaking, counsel fees should not be awarded by the Provincial Judges Court (Civil Division) because this Court is designed for self-representation. Therefore, if parties wish legal representation, they should do so at their own expense. However, we do not think that the Court should be precluded from awarding counsel fees in special cases. For example, the Court might wish to award counsel fees against a party who has brought or defended an action unreasonably or in an action where the right to discovery is permitted. Aside from these special cases,however, we propose that no counsel fee be awarded. We recommend:

RECOMMENDATION 22

That the Provincial Judges Court (Civil Division) may award a successful party an allowance for necessary disbursements but that no

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[49] Small Claims Act R.S.B.C. 1979 c. 384; am. S.B.C. 1980 c. 50, S.B.C. 1981 c. 20, s. 56.

[50] The Small Claims Enforcement Act R.S.S. 1965 c. 102 s. 22.

[51] Small Claims Court Act R.S.O. 1980 c. 476 s. 104(1).

counsel fees be generally awarded unless the Court is satisfied that the special circumstances of a case make it necessary in the interests of justice to do so.

Enforcement

3.49 The inability of judgment creditors to enforce small claims judgments has been a common complaint here and in other jurisdictions. Individuals are often unaware that the onus is on them to realize on their judgments, and the procedures can be complicated and frustrating to self-represented litigants. Enforcement is a common problem in all courts. In small claims courts, however, there is the special concern to make the enforcement process more understandable to self-represented litigants while saving them time and additional expense.

3.50 This objective of making the enforcement procedures more understandable to self-represented litigants can be achieved, at least in part, if the Court's clerks assist judgment creditors with the forms and technical procedures, as earlier recommended (see Recommendation 10, supra). Experience elsewhere suggests that mediation may improve the incidence of the successful satisfaction of judgments, especially if a system similar to that which has been established in the Windsor-Essex Mediation Centre, in regard to payment schedules, is implemented (see para. 3.29). Further involvement by the judiciary would also be beneficial. Experience in other jurisdictions has shown that when claims are adjudicated and the judges of the small claims court enquire as to the time and manner (lump sum or installment) of payment so that a reasonable and realistic payment schedule is devised, there is greater success in the judgment debtor's compliance with the order than is presently the case.

3.51 Judgments of the Provincial Judges Court (Civil Division) should be enforceable without the necessity of registering the judgment in another court. The court should have the same powers as the Court of Queen's Bench for enforcing its orders and judgments, as does the Provincial Judges Court (Family Division) pursuant to section 23(3.1) of "The Provincial Judges Act".

We recommend:

RECOMMENDATION 23

That the judgments of the Provincial Judges Court (Civil Division) be enforceable without being filed in another court.

RECOMMENDATION 24

That the Provincial Judges Court (Civil Division) have the same powers as the Court of Queen's Bench for enforcing its orders and judgments.

Hours of Business

3.52 As the small claims court is open only during regular business hours, people who are unable to take time off work to file and attend are effectively denied access to the court. As well, lost wages can be a considerable hidden expense for a litigant. Night court has proven to be overwhelmingly popular in Nova Scotia. In downtown Toronto, as well, there is night court for claims under $500. In both Toronto and Nova Scotia, claims are adjudicated in the evening by lawyers with civil litigation experience, who sit on a rotational basis. We think that consideration should be given to having court sittings on some Saturdays and some weekday evenings and we so recommend:

RECOMMENDATION 25

That consideration be given to providing sittings in the Provincial Judges Court (Civil Division) on Saturdays and some weekday evenings.

CHAPTER 4

IMPLEMENTATION OF REFORM

4.01 We discuss in this Chapter the implementation of the recommendations we have advanced in this Part of our Report on the Structure of the Courts. Subject to two exceptions, we merely list some of the matters which must be attended to, rather than to submit formal recommendations concerning the manner of their execution.

4.02 As with the recommendations concerning the amalgamation of the County Courts and the Court of Queen's Bench, the implementation of the reforms set forth in this Report will require attention by the legislative, executive and judicial arms of government. The basic matters which must be undertaken by each of these powers, often in cooperation with each other, are set forth in the following paragraphs.

4.03 Legislative. The establishment of the Provincial Judges Court (Civil Division) will, of course, require enabling legislation. As the enabling legislation of the Criminal and Family Divisions is set forth in Parts III and IV respectively of "The Provincial Judges Act", it seems logical that the legislation comprising the Civil Division form a Part of the same statute. Its insertion in this Act would also make unnecessary the enactment of several general provisions concerning the Court which comprise Parts I and V of this Act. We recommend:

RECOMMENDATION 26

That creation of the Provincial Judges Court (Civil Division) be achieved, so far as legislation is concerned, by amendment to "The Provincial Judges Act".

In Part I of this Report we recommended the repeal of "The County Courts Act" which encompasses the present legislation concerning the adjudication of small claims.

4.04 Executive. It will be necessary for the Lieutenant-Governor-in-Council to appoint full-time judges to the new Court in accordance with Part I of "The Provincial Judges Act". Judicial centres of the new Court will require designation as will the court facilities, services and budget.

4.05 Judicial. The full-time judges of the Court will need to establish a circuit and assignment system in consultation with the Chief Provincial Court Judge. Although we should point out that it has generally been the practice in Canada to set forth much of small claims practice and procedure in the enabling legislation, we think it advisable that the Provincial Court Judges draft rules regarding practice and procedure. There needs to be legislation in "The Provincial Judges Act" to authorize the judges of the Civil Division to draft rules of practice and procedure for small claims. Accordingly, we recommend:

RECOMMENDATION 27
That the legislation give the authority to the judges of the Provincial Judges Court (Civil Division) to draft rules of practice and procedure.

4.06 A matter to which considerable attention will be required is with respect to the place of filings and hearings of the new Court. Presently, small claims court is governed by the same rules regarding the determination of the proper place of the filing and hearing of an action as the County Courts (Part I) and the Court of Queen's Bench. That is, the pleadings and hearing of an action generally take place in the judicial district in which the cause of action arose (in whole or in part), or in which the defendant resides or carries on business. In Part I of this Report, we put forward a proposal for consideration of the Court of Queen's Bench which we thought might result in

greater flexibility and accessibility for litigants. [52] We also recommended that there be one judicial district in Manitoba with several hearing and filing centres throughout the Province. These facts may wish to be considered by the Provincial Judges Court (Civil Division) in determining the appropriate places for filings and hearings of small claims.

4.07 There are a number of administrative matters which must be attended to. These include the appointment of clerks, whose duties will include informing litigants of small claims procedure prior to the hearing and assisting successful parties in the enforcement of their judgments (See Recommendation 10, supra). In this respect, it might be considered appropriate to draw upon the established expertise of clerks who presently adjudicate small claim disputes. Staff for the mediation pilot project must also be appointed. Provision for new gowns and stationery will be necessary. It is very important that there be appropriate facilities for the filing and hearing of small claims disputes.

4.08 Considerable attention should be given to the information and forms of the new Court. They are presently insufficient in comparison to that used elsewhere. For example, some defendants complete the Notice of Objection form inadvertently, while meaning only to state the elements of their defence to the claim. Some provinces, such as Saskatchewan have a variety of claim forms, each suited to a particular type of claim. Many claim forms provide step-by-step instructions to the plaintiff regarding the completion, filing and service of the claim on the defendant. As well, a defendant is normally notified on the claim form of the consequences that may follow in the event (s)he takes no further action. Publications providing much more information to the public about bringing or defending a small claims suit are also available in other provinces, notably British Columbia. We recommend:

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52 Supra n. 1, at 26-27.

RECOMMENDATION 28

That considerable attention be given to the information and forms of the Provincial Judges Court (Civil Division) so that the public will be better informed of the practice and procedure for bringing or defending a small claim for adjudication.

4.09 Not only is it advisable that the information and forms of the new Court be improved; it is also important that considerable attention be given to publicizing the existence of the Provincial Judges Court (Civil Division) to society as a whole. We referred to the precept in Chapter 2, and we repeat it here, that knowledge is an essential tool for the exercise of substantive rights. Unless the existence and function of the new Court are broadly publicized, it is unlikely that the Court will be used by all segments of society, including those with low or moderate means who might otherwise be alienated from the civil court system. Accordingly, we recommend:

RECOMMENDATION 29

That considerable attention be given to publicizing the existence and function of the Provincial Judges Court (Civil Division) so that the public will be more aware of the existence of the small claims court in Manitoba.

4.10 It will be necessary to have a period of time between the date legislation is passed and the operative date of the legislation. The executive will need to assign or appoint judges to the new court and these members of the judiciary will require time to prepare the rules of practice and procedure for small claims. There are also several other executive and administrative matters, some of which we have described in this Chapter, which must be attended to before the Court is fully constituted and able to "open its doors to the public". Based upon experience in other provinces, we recommend:

RECOMMENDATION 30

That there be a period of at least six months between the date legislation is passed and the date the Court is fully constituted and operational.

4.11 It would be preferable for the operative date of the small claims legislation to precede or be simultaneous with the effective date of the amalgamation of the County Courts of Manitoba and the Court of Queen's Bench. This would ensure that the transfer of adjudication of small claims from the County Courts to the Provincial Judges Court (Civil Division) could be accomplished with as little interruption as possible.

CHAPTER 5

SUMMARY OF RECOMMENDATIONS

The recommendations of the Commission are as follows:

1. That the adjudication of small claims continue to be heard by a court rather than by an administrative tribunal, mediator or arbitrator.

2. That the small claims court have legally-trained adjudicators.

3. That the small claims court be associated with an existing court and that this court be the Provincial Judges Court.

4. That a separate Civil Division of that court be created for the adjudication of small claims.

5. That the court for the adjudication of small claims be called the Provincial Judges Court (Civil Division).

6. That, subject to the exceptions set forth in Recommendation 7, the jurisdiction of the Provincial Judges Court (Civil Division) be exclusive.

7. That the Provincial Judges Court (Civil Division) be given the statutory authority to transfer an action to the Court of Queen's Bench on the application of any party to an action in the following cases:

   (1) where there is the consent of all of the parties to the action, in which case the transfer shall be ordered;

   (2) where the defendant pleads a set-off or counter-claim and the Court is satisfied that the set-off or counter-claim involves a matter beyond the jurisdiction of the Court; or

(3) where the Court is satisfied that, having regard to the exceptional circumstances of the case, it would be proper to do so.

8. That the maximum monetary jurisdiction of the Provincial Judges Court (Civil Division) be $3,000, exclusive of interest.

9. That the jurisdiction of the Provincial Judges Court (Civil Division) be as follows:

The Court, in addition to the jurisdiction given by any Act having the force of law in the province, has jurisdiction in

(a) any claim or counterclaim for debt (whether payable in money or otherwise) or damages (including damages for breach of contract) where the amount does not exceed $3,000 exclusive of interest;
(b) any action of replevin where the value of property distrained, taken or detained does not exceed $3,000; and
(c) interpleader proceedings where the value of the property in dispute does not exceed $3,000.

The Court has no jurisdiction in an action

(a) in which the title to land is brought into question;
(b) in which the validity of any devise, bequest or limitation is disputed;
(c) for the administration of estates or trusts;
(d) for malicious prosecution, false imprisonment, defamation; and
(e) against any judge, justice of the peace or peace officer for anything done by him while executing the duties of his office.

The Court has no jurisdiction to award an injunction or specific performance.

10. That the clerks employed by the Provincial Judges Court (Civil Division) inform litigants of the procedure of the Court and assist successful parties in the enforcement of their judgments, when necessary.

11. That a mediation programme be established in Winnipeg, or another urban centre, on a pilot basis, for the purpose of resolving claims commenced in the Provincial Judges Court (Civil Division), from which the feasibility of a province-wide mediation system can be assessed.

12. That the rules of evidence be not strictly applied in the Provincial Judges Court (Civil Division); but that everything relevant be admissible except privileged evidence and evidence that is made inadmissible by statute.

13. That the legislation provide that all communications made by the parties during the course of mediation are without prejudice and absolutely privileged.

14. That the legislation provide that a mediator is not competent or compellable to give evidence for or against any party with respect to statements, admissions or communications made to a mediator during the course of mediation.

15. That no class of plaintiff be excluded from the Court.

16. That there be no restriction on the representation of parties by barristers and solicitors.

17. That the Provincial Judges Court (Civil Division) have the authority to order an examination for discovery and a discovery of documents for any action within the jurisdiction of the new Court where the Court is satisfied that the special circumstances of a case make it necessary in the interests of justice to do so.

18. That in the Rules of Court initially adopted, the current default procedure in the small claims court requiring proof of claim and amount at trial be retained.

19. That the Provincial Judges Court (Civil Divison) have the jurisdiction to set aside or vary a judgment by default on such terms as may be just.

20. That there be a right to an appeal from a decision of the Provincial Judges Court (Civil Division), on law or mixed law and fact, to the Court of Queen's Bench.

21. That leave of the Court of Appeal of Manitoba be required to appeal the decision of the Court of Queen's Bench.

22. That the Provincial Judges Court (Civil Division) may award a successful party an allowance for necessary disbursements but that no counsel fees be generally awarded unless the Court is satisfied that the special circumstances of a case make it necessary in the interests of justice to do so.

23. That the judgments of the Provincial Judges Court (Civil Division) be enforceable without being filed in another court.

24. That the Provincial Judges Court (Civil Division) have the same powers as the Court of Queen's Bench for enforcing its orders and judgments.

25. That consideration be given to providing sittings in the Provincial Judges Court (Civil Division) on Saturdays and some weekday evenings.

26. That creation of the Provincial Judges Court (Civil Division) be achieved, so far as legislation is concerned, by amendment to "The Provincial Judges Act".

27. That the legislation give the authority to the judges of the Provincial Judges Court (Civil Division) to draft rules of practice and procedure.

28. That considerable attention be given to the information and forms of the Provincial Court (Civil Division) so that the public will be better informed of the practice and procedure for bringing or defending a small claim for adjudication.

29. That considerable attention be given to publicizing the existence and function of the Provincial Judges Court (Civil Division) so that the public will be more aware of the existence of the small claims court in Manitoba.

30. That there be a period of at least six months between the date legislation is passed and the date the Court is fully constituted and operational.

This is a Report pursuant to subsections 5(2) and (3) of "The Law Reform Commission Act" signed this 7th day of March 1983.

Clifford H.C. Edwards, Chairman

Knox B. Foster, Commissioner

D. Trevor Anderson, Commissioner

Geraldine MacNamara, Commissioner

M. Anne Riley, Commissioner

NOTE: In view of their positions, Judges Lockwood and Thompson did not attend any of the meetings nor take part in any of the discussions dealing with the matters covered in this Report. They are therefore not signatories hereto.

APPENDIX

RULE 42 OF THE RULES OF THE PROVINCIAL COURT (CIVIL DIVISION) R.R.O. 1980, REG. 806

DISCOVERY

42-(1) Except as provided in this rule, no discovery is permitted.

(2) In an action where the amount claimed exceeds $1,000, exclusive of interest, a judge may, on the application of a party and if satisfied that the special circumstances of the case make it necessary in the interests of justice, order discovery between the parties on such terms as to costs and otherwise as he may direct.

(3) Where the discovery is to take the form of the examination of a party, the judge may in his discretion give directions as to the scope of the examination, whether it is to be by written questions and answers or by oral examination, and if by oral examination before whom it is to be conducted or recorded.

(4) The judge may, upon the application of a party to any action and upon such terms as he deems proper, make an order for the detention, preservation, inspection or measuring of any property that is the subject of the action, or as to which any question may arise, and for all or any of these purposes may authorize any person to enter upon or into any land or building in the possession of any party to the action, and may authorize such samples to be taken or observations, plans or models to be made or experiment to be tried, as are necessary or expedient for the purpose of obtaining full information or evidence.

(5) The judge may, upon application of a party to any action, upon notice, and upon such terms as he deems proper, make an order for the production and inspection of any books, writings, instruments or documents, relating to or affecting the question in issue and in the possession, power, custody or

control of any other party to the action, at such time and place as he appoints and in default of such production for inspection as so directed the judge may in his discretion exclude such books, writings, instruments or documents from being given in evidence in such action.